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No. 93-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAURICIO GUTIERREZ, FRANCISCO AGUIRRE, SIMON BLANCO, TERESA CALZADA, DOMINGO CORTEZ, DELFINO DE LA GARZA, CONCEPCION GARZA, ALFREDO GONZALES, MARIA CONCEPCION GUILLEN, ELENA HERRERA, ELISEO LERMA, VINCENTE LOPEZ, MARIA MARTINEZ, PEDRO ORTIZ, ANASTACIO RAMIREZ, CAROLINA SALINAS, VIRGINIA AGUIRRE, PAULA CHAVEZ, JOSE GARCIA SOSA, MARIA GUADALUPE GARZA, CANDELARIA HINOJOSA, MARIA ZAPATA, and OFELIA GAONA,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where members of a collective bargaining unit allege that an employer violated a collective bargaining agreement by not requiring another party to assume the entire collective bargaining agreement, are the union members asserting a "uniquely personal right," thus entitling them individually to sue the employer under §301 of the Labor Management Relations Act?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners have misdescribed the issue framed by this case in order to enhance its candidacy for certiorari. In the process, they have redrafted the claim presented in their complaint to the district court and in their briefs to the Fifth Circuit so extensively

that the Question Presented, as set forth in their Petition, was not in fact presented below.

Petitioners filed this action in the Southern District of Texas in 1986 against Respondent United Foods, Inc., their former employer.[1] They alleged that they were members of a union which had a collective bargaining agreement ("CBA") with respondent containing a "successors and assigns" clause that provided:

> "If the Owner or Company hereunder sells . . . his business . . ., the successors. . . shall be bound fully by the terms of this Agreement in the place and stead of the Owner or Company signatory hereto" (First Amended Complaint ¶8; R. 555).

Petitioners further pleaded that respondent, in December 1985, sold its Brownsville, Texas, facility (where they were employed) to a company known as Tex-Mex Cold Storage, Inc. ("Tex-Mex"), and they charged respondent with breaching the successors and assigns clause of the CBA

> ". . . by failing to include in its sales contract with Tex-Mex Cold Storage, Inc. a provision pursuant to which the latter assumed all the obligations of the collective bargaining agreement" (*Id.* ¶10; R. 556).

The trial court sustained respondent's motion for summary judgment, holding that the successors and assigns clause created collective rights, rather than the "uniquely personal rights" that this Court has required as a condition to the standing of individual union members to sue the employer for breach of contract under §301 (Pet. Apdx. A23-24). The Fifth Circuit affirmed, while criticizing petitioners' counsel for "mischaracterizing the right at issue" in oral argument (Pet. Apdx. A9, n.11). Petition-

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[1] Respondent is a corporation with no parents and no subsidiaries.

ers, undaunted, have persisted in this Court in their mischaracterization of the right at issue and of their pleaded assertions. As a result, the Question Presented, as stated in their Petition, begs the real question and is not in fact presented at all by this case.

Furthermore, it is undisputed that petitioners did not exhaust the grievance steps set forth in the CBA, which culminate in arbitration. In fact, it is admitted that the first step in the grievance procedure was never initiated. Even though this was ostensibly a suit for breach of the duty of fair representation, the union was not joined as a defendant because petitioners had settled with the union, and the complaint contained no allegations that the union had acted in an arbitrary, discriminatory or bad faith manner.

REASONS WHY THE WRIT SHOULD BE DENIED

Introduction and Summary

The issue actually presented by the record in this case is a simple one: Is an alleged "right" to have an employer force a successor employer to assume a collective bargaining agreement a "uniquely personal right" to individual union members? This question is dispositive because the parties agree that petitioners do *not* have standing to sue under §301 unless their claim is for violation of a "uniquely personal right."

The lower courts correctly concluded that the purported right upon which petitioners sued — violation of the successors and assigns clause which allegedly required Tex-Mex to assume the CBA — was not a uniquely personal right. Indeed, if assumption of the entire collective bargaining agreement and the forced recognition of the union as the collective bargaining agent is not a collective right, we are at a loss to identify one.

The law is so clearly against petitioners that, as noted, they have tried to reframe the issue in their Petition. They now say that the rights involved are seniority rights and that the Fifth Circuit agreed with this characterization. Petitioners are fantasizing. The Fifth Circuit noted that petitioners reformulated their position at oral argument and then pointed out the illogic of the revised argument (Pet. Apdx. A9, n.11). The only act or omission of United Foods about which petitioners complained was the failure to force Tex-Mex to adopt the collective bargaining agreement. The fact that the purchaser did not follow the seniority provisions of the collective bargaining agreement is not a violation of those "rights" by respondent. Petitioners' argument that the Fifth Circuit imposed new restrictions on §301 suits and adopted a test inconsistent with cases from other circuits is premised on their mischaracterization of the decision below, coupled with a flawed analysis of those other cases.

Given the clarity of the law, the consistency among the published cases with similar fact patterns, the inappropriateness of petitioners' raising new issues in their Petition, and the existence of at least three alternative grounds for affirming the judgment in favor of respondent, there is nothing about this case that warrants this Court's attention.

I. PETITIONERS HAVE NO STANDING TO MAINTAIN A §301 ACTION BECAUSE THEY ARE NOT ASSERTING A CLAIM FOR UNIQUELY PERSONAL RIGHTS.

A. The "Right" to Force Assumption of a Collective Bargaining Agreement by a New Employer is Not a Uniquely Personal Right.

A union member does not have standing to bring an individual claim for breach of a CBA unless, among other things, a "uniquely personal" right is involved. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651, 657 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967). The *Hines* Court listed examples of such rights: wages, hours, overtime pay, and wrongful discharge. The rule generally requiring the *union* to redress violations of a CBA flows from the federal policy that "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975). Petitioners acknowledge that they do not have standing to enforce collective rights (Pet. 5).

The question decided by the Fifth Circuit was whether petitioners had asserted a uniquely personal right allegedly violated by respondent when it did not force Tex-Mex to assume the collective bargaining agreement pursuant to the successors and

assigns clause.[2] In other words, the "right" plaintiffs seek to vindicate is the right of the union to recognition as the collective bargaining agent as a result of respondent's putative obligation to force the purchaser to assume the CBA, and derivatively the right of bargaining unit members as a whole to collective participation in all benefits of that contract as so assumed. It is difficult to conceive of a right more "collective" and less "uniquely personal" than the "right" to force assumption of an agreement which by its own terms is labeled "collective." Assumption of an entire CBA is not remotely similar to the "wages, hours, overtime pay, and wrongful discharge" types of rights delineated in *Hines*. The Fifth Circuit was squarely on target when it said this is not a marginal case (Pet. Apdx. A9).

B. There is No Conflict or Confusion Among the Courts on the Issue Presented Here.

All cases with similar facts have rejected the argument that uniquely personal rights are involved here. The Petition erroneously suggests the lower courts are befuddled and have produced divergent analyses. The cases finding individual standing involved much different facts, and the Fifth Circuit correctly differentiated the authorities relied on by petitioners.

The Court of Appeals' decision followed the holdings of similar cases. For instance, in *Anderson v. Ideal Basic Industries*, 120 L.R.R.M. 2039 (E.D. Tenn. 1985), *aff'd*, 804 F.2d 950 (6th Cir. 1986), union members sued an employer for alleged breach of a successors and assigns provision in a collective bargaining agreement. The court held that any obligations imposed by the successors clause could be enforced only by the union, not by the members. *Id.* at 2043-44.

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[2] For purposes of the standing issue, we assume *arguendo* that the CBA imposed such a requirement upon respondent. But as we demonstrate in Section II.A., *post*, there was no such duty.

The Fifth Circuit also properly relied on *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967). As in the instant case, the company in *Brown* ceased operations at a plant. Individual employees sued under §301 for breach of the CBA, but the court ruled that the company could close a plant completely without incurring individual liability to each of its employees. *Id.* at 657.

Similarly, in *Jensen v. Farrell Lines, Inc.*, 658 F.2d 27 (2d Cir. 1981), the Second Circuit held that only the union, and not an employee, could bring a claim for breach of an agreement by a successor employer to assume a collective bargaining agreement. The court, citing *Brown*, held that a claim relating to the existence of a union-employer relationship can only be vindicated by a union and is not a personal right that can be asserted by an employee. *Id.* at 29. *Accord, Russom v. Sears, Roebuck & Company*, 415 F. Supp. 792 (E.D. Mo. 1976), *aff'd*, 558 F.2d 439 (8th Cir.), *cert. denied*, 434 U.S. 955 (1977) (only the union, and not its constituent members, had the right to insist that an employer arbitrate under a labor agreement).

Petitioners' suggestion of a conflict among the circuits is based on a seriously strained misreading of cases on which they rely and which, as the Fifth Circuit noted, are factually distinct. For instance, in *Schultz v. Owens-Illinois, Inc.*, 560 F.2d 849 (7th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978), only 25 of 366 members of the bargaining unit could benefit from the right asserted in that case (participation in an apprenticeship program which required certain qualifications). In contrast, petitioners here seek to assert a right that would apply to all members of the bargaining unit, namely, continued enforcement of the CBA. Contrary to petitioners' statement that *Schultz* is inconsistent with the Fifth Circuit's decision (Pet. 15-16 n.8), the court below, quoting *Schultz*, said: "*Schultz* does endorse the principle upon which we base our decision today. Namely, that a uniquely

personal right is not a 'right possessed by the bargaining unit as a whole'" (Pet. Apdx. A14).

Nor is there inconsistency with *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978). That case simply held that overtime pay is a uniquely personal right, which is wholly in conformity with *Hines*. *Id.* at 511.

Another of petitioners' authorities is not even a §301 case but deals with standing under Article III of the Constitution, rather than §301 standing. In *Santos v. District Council of NewYork City*, 547 F.2d 197 (2d Cir. 1977), members of one union sued another union. The defendant did not dispute whether the rights claimed were "uniquely personal," which was not directly relevant in that case. *Id.* at 200. *Santos* does *not* equate Article III standing with §301 standing, as petitioners wrongly contend.

Petitioners have also misstated the holding of *Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371 (11th Cir. 1983), and they again confuse standing under §301 with Article III standing. The *Diaz* court held that the plaintiffs had Article III standing. *Id.* at 1374, *citing Warth v. Seldin*, 422 U.S. 490, 508 (1975). When the court addressed the §301 question, it applied the "uniquely personal right" rule. *Id.*[3]

Bell v. IML Freight, Inc., 589 F.2d 502 (10th Cir. 1979), did not cite *Hines* or the "uniquely personal right" principle. It involved instead a direct conflict of interest among union members, some of whom would suffer when others benefited from a revised seniority list. The Tenth Circuit merely held that those union members whose seniority was lost by reason of union action could maintain a suit under §301.

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[3] The Eleventh Circuit in *Diaz* characterized the "uniquely personal right" question as a subject matter jurisdiction issue rather than a standing issue.

In summary, the purported "conflict" between the actual ruling of the Fifth Circuit and the other authorities cited by petitioners is wholly illusory.

C. Petitioners Cannot Now Change Their Cause of Action, Create a New Claim, and Call it "Uniquely Personal."

Until the Petition for a Writ of Certiorari, petitioners claimed in their court filings that the alleged wrongful act of United Foods was its failure to force the purchaser of plant assets to assume the CBA.[4] As previously indicated, petitioners tried to change their characterization of their claim at oral argument in the court of appeals. Now they say that they are alleging that *United Foods* violated their seniority rights when *Tex-Mex* failed to apply seniority rules in rehiring the lawfully-terminated employees.

The Fifth Circuit rejected petitioners' eleventh-hour effort to recharacterize their claim because the new description was wrong. This Court should adopt the same approach for both procedural and substantive reasons. Procedurally, this Court should not consider an argument raised for the first time at oral argument in the court of appeals and denied consideration by that court. Petitioners' complaint and briefs described their claim as

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[4] In their brief to the Fifth Circuit, petitioners argued that the court should adopt an unprecedented definition of uniquely personal rights which would include the right to force assumption of the CBA. They maintained that all rights are "uniquely" personal unless the subject matter is reserved exclusively to the union as a matter of law. Petitioners could think of only two such rights (the right to picket and the right to bargain collectively), neither of which applies to violations of a CBA. In light of the fact that every violation of a CBA would thus constitute a violation of a "uniquely" personal right under petitioners' theory, the Fifth Circuit properly rejected petitioners' invitation to let the exception swallow the rule (Pet. Apdx. 7-8).

one for violation of the successors and assigns clause, not the seniority section.

Substantively, it makes no sense to characterize this case as a claim for breach of the seniority provisions of the CBA. The defendant was Respondent United Foods, not the successor employer Tex-Mex. It was not respondent that failed to apply seniority provisions in hiring. The only act or omission of United Foods which could conceivably give rise to a complaint was the failure to force the purchaser to adopt the CBA. Once the sale occurred, United Foods had no more input on seniority issues than it did on union recognition, holidays, grievance procedures, or any of the other matters encompassed by the CBA. Petitioners' new theory thus has a logical, as well as a legal, gap.

D. The Fifth Circuit Did Not Impose New "Restrictions" on §301 Actions.

Petitioners try to make their argument palatable by distorting the Fifth Circuit's holding and then complaining about the "restrictions" of the fictionalized ruling. They suggest that the Fifth Circuit first concluded that petitioners were suing respondent for violating uniquely personal seniority rights, but then held that such rights were "collective" because petitioners first had to prove the existence of a collective bargaining agreement (Pet. 6, 11-12, 14-17).

That is simply not so. The decision of the Fifth Circuit was straightforward and logically unassailable: (1) Petitioners sued respondent for violating the successors and assigns clause by not forcing assumption of the CBA; (2) any right to an assumption of the CBA was not "uniquely personal" to individual union members; and (3) therefore petitioners as individuals did not have standing under §301 (Pet. Apdx. A16).

In light of petitioners' misdescription of the Fifth Circuit's ruling, it is specious for them to maintain that this case "could

eliminate standing in virtually all hybrid §301/fair representation cases" (Pet. 14). The holding below addressed one type of alleged right: A right to forced assumption of a CBA pursuant to a successors and assigns clause. The court did not label seniority rights as either collective or uniquely personal. Its holding was narrow and unexceptionable and did not impose any new limitations on §301 actions.[5]

II. THERE ARE AT LEAST THREE INDEPENDENT BASES FOR UPHOLDING THE JUDGMENT OF THE FIFTH CIRCUIT.

A grant of certiorari in this case would not be to petitioners' benefit because there are three alternate grounds on which the judgment of the Fifth Circuit can be affirmed. Each of these grounds was briefed by respondents in the Fifth Circuit, but that court's disposition of the standing issue made it unnecessary to discuss any of these alternative bases for affirmance.

A. United Foods Did Not Breach the Collective Bargaining Agreement.

A fundamental underpinning of petitioners' case is the proposition that respondent breached the successors and assigns clause by not forcing Tex-Mex to assume the CBA. The clause imposes no such duty on respondent, as the court held in *Central States, Southeast and Southwest Areas Pension Fund v. PYA/Monarch of Texas, Inc.*, 851 F.2d 780, 782-83 (5th Cir. 1988) (in the absence of specific language prohibiting an employer from engaging in a transaction unless the collective bargaining agreement is assumed, an employer is *not* obligated to secure an

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[5] Petitioners also overstate the case by arguing that they would be without a remedy if they are denied standing (Pet. 12-13). A true breach of a CBA can be redressed at the instance of the union, but petitioners let the union off the hook for supposedly failing to protect their collective rights when they entered into a settlement with the union (Pet. 3, n.4).

assumption of the collective bargaining agreement). Hence, a ruling that petitioners had standing to sue would profit them nothing.

B. Petitioners Failed to Exhaust Their Contractual Remedies.

Even when the alleged right an employee seeks to enforce is one which he is entitled to pursue personally, he must first utilize the procedures spelled out in the collective bargaining agreement and in the union constitution. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). Petitioners admitted below that they did not exhaust the CBA grievance procedures (Appellants' Br. 8, 23). Instead, they argued that they were excused from compliance, but this requirement can be dispensed with only in very limited circumstances, which were not present here.

Petitioners had a duty to pursue each step of the grievance procedure but did not do so. They are thus unable to maintain a §301 action, even if they have standing.

C. Individual Employees Cannot Bring a §301 Claim Against an Employer Unless They Allege and Prove that the Union Breached its Duty of Fair Representation, and Petitioners Did Not Make the Requisite Allegations.

Even assuming, *arguendo*, that petitioners have a viable individual claim against respondent, they cannot pursue it because they have not properly alleged or demonstrated a breach by the union of the duty of fair representation. In order to prove a breach of the duty of fair representation — a necessary predicate to a claim against the employer — a plaintiff must demonstrate that the union acted in an arbitrary, discriminatory or bad faith manner. *Air Line Pilots Ass'n, Intn'l v. O'Neill*, 499 U.S. 65 (1991). *See also DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 (1983).

Petitioners did not allege that the union's actions were arbitrary, discriminatory or in bad faith. They merely averred that the union did not process a grievance.[6] Nor did they present any such evidence in connection with the summary judgment motion. The only "evidence" of "arbitrary conduct" was that the union did not do what petitioners wanted. Summary judgment cannot be avoided on this basis. *Air Line Pilots*, 499 U.S. at 78-79. For this additional reason, petitioners' standing is academic.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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[6] The only reference in the Complaint to the duty of fair representation is in the first paragraph, entitled "Preliminary Statement," which states in passing that the union "breached its duty to represent Plaintiffs fairly."